IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-422 and 77-543

NATIONAL EDUCATION ASSOCIATION, ET AL., APPELLANTS,

versus

STATE OF SOUTH CAROLINA, ET AL., APPELLEES.

UNITED STATES OF AMERICA, APPELLANTS,

versus

STATE OF SOUTH CAROLINA, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

MOTION TO AFFIRM FOR THE STATE PARTIES

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Pursuant to Rule 16(1)(c) of the Rules of the Supreme Court of the United States, the State Appellees move to affirm the final judgment and decree of the District Court on the ground that it is manifest from the record that the questions raised by the Appellants and upon which the decision of this case depends are primarily (a) questions of fact involving no clear error by the lower court or, (b) questions of law substantially answered by recent decisions of this Court, and are thus not significant enough to warrant plenary consideration by this Court.

QUESTIONS PRESENTED

I

Whether the District Court's finding that there is no racially discriminatory purpose behind (a) South Carolina's teacher certification examination and (b) the formula for allocating State funds to supplement teacher salaries is "clearly erroneous" in view of substantial evidence in the record that both the examination and the allocation formula were established for nondiscriminatory reasons?

II

Whether there is so little relationship between a person's knowledge of subject matter and that person's ability to teach that South Carolina may not lawfully use a professionally validated examination which measures knowledge of subject matter as one factor in (a) teacher certification and (b) the formula allocating State funds to the local districts to supplement teacher salaries?

STATEMENT OF THE CASE

This case involves South Carolina's use of the National Teacher Examinations (NTE), a series of standardized objective tests designed and administered by the Educational Testing Service[1] (ETS), to license teachers who teach in the State's public school system. For more than thirty years, pursuant to its authority "to prescribe and enforce rules for the classification and certification of teachers,"[2] the South Carolina State Board of Education (State Board) has required all candidates for certification to take the NTE and has used these scores both to license teachers and to allocate State funds to the local school districts

[1] A non-profit corporation, located in Princeton, New Jersey.
[2] Section 59-5-60, Code of Laws of South Carolina, 1976.

which actually employ and pay the teachers.[3] The need for testing teacher candidates arose in an era when many teachers had not finished or even attended college. The problem of wide disparity in admission and grading standards at teacher training colleges persists today. Plaintiffs-Appellants are seeking a declaratory judgment that the pertinent laws and regulations are invalid, and injunctive relief enjoining the State from enforcing these laws and regulations insofar as they require attainment of a prescribed NTE score as a prerequisite for certification as a teacher.

PROCEEDINGS BELOW

This action was brought by the United States government through its Attorney General on September 15, 1975, against the State of South Carolina, the South Carolina State Board of Education, the State Retirement Fund, the Budget and Control Board (the State Defendants), and three local school districts[4] alleging that South Carolina's use of the NTE to certify teachers and its allocation of teacher salary funds to the local districts based in part on the teachers' NTE scores were in violation of Title VII of the 1964 Civil Rights Act[5] and the Fourteenth Amendment.

[3] In South Carolina, the local school boards hire, fire, supervise and pay teachers. Section 59-19-90, Code of Laws of South Carolina, 1976, as amended. Funds for teacher salaries are derived from three sources: local, state and federal governments. In 91 of the State's 92 school districts some teachers are paid entirely from local or federal funds. In 1975-76, the State's three largest districts, Charleston, Greenville, and Richland No. 1 (Columbia) had 298, 306, and 261 teachers respectively who were paid entirely with local funds. Most teachers are paid from a combination of local funds and a State salary supplement disbursed by the local district. 1975-76 *Financial Report, State of South Carolina Department of Education.*

[4] The Board of Trustees of the Charleston County School District, the Colleton County Board of School Trustees, and the Board of School Commissioners of School District No. 1 of Richland County. Plaintiffs sought to bring their action against a defendant class of all local school boards within the State and sought to certify the class pursuant to Rule 23, Federal Rules of Civil Procedure. The motion was denied for the reasons set forth in the Court's Opinion. *See* NEA J. S. App. at pp. 4a-5a.

[5] 42 USC Section 2000e.

On September 17, 1975, the South Carolina Education Association, the National Education Association and nine named individuals as class plaintiffs brought suit against the same defendants in their official and individual capacities basing their action upon the Fourteenth Amendment and Title VII and alleging in addition violations of Sections 1981 and 1983 of Title 42 of the United States Code. Thereafter, these private plaintiffs moved to intervene in the action brought by the United States. When their motion was granted, they became plaintiff-intervenors and their separate action was stayed.[6]

Since the plaintiffs' allegations included claims that several South Carolina statutes were unconstitutional, a three-judge court (Haynsworth, Chief Circuit Judge; Russell, Circuit Judge; Simons, District Judge) was convened pursuant to 28 USC Section 2281.[7] By further order of the Court the action was bifurcated with issues of liability to be considered first and the issue of damages along with the certification of the alleged plaintiff class reserved for later determination if necessary.[8]

Discovery was exhaustive, extending over a nine-month period with the final submission to the Court of over one hundred (100) depositions, documentary evidence amounting to more than 20,000 pages (17 file boxes), and a three-volume validity study.[9] Lengthy proposed findings and briefs were submitted by both sides. Additionally, ETS filed a brief as *amicus curiae* supporting the NTE and the validity study. The case was argued before the three-judge

[6] Order No. 1, Civil Action No. 75-1610, United States District Court for the District of South Carolina, Columbia Division. The United States and the plaintiff-intervenors will be referred to collectively as the Plaintiffs in this Motion.

[7] This action predates the 1976 amendments to 28 USC Section 2281.

[8] See n. 6, *supra*.

[9] The ETS report of the study was entitled *Report on a Study of the Use of the National Teacher Examinations by the State of South Carolina*. This report was part of the record. *See* Manning Deposition, Ex. D-8, S-MAN 32A, 32B, and 32C.

panel on August 13, 1976, and decided on April 12, 1977, in a forty-four page opinion. The opinion of the District Court reviewed the history of the State's certification program and its use of the NTE from the 1940's through the major revision of the certification system in 1976. Through its review of the evidence the Court concluded that the Defendants had assumed and successfully met the burden of rebutting Plaintiffs' allegations of purposeful discrimination and in fact had convincingly demonstrated a consistent program of teacher certification and an allocation of State funds designed to improve the quality of education in the State.[10] The opinion also concluded that the State had the right, under both constitutional and statutory standards, to adopt academic requirements and to use written achievement tests designed and validated to disclose the minimum amount of knowledge necessary for effective teaching.[11] Both the United States and the plaintiff-intervenors filed notices of appeal on June 13, 1977.

THE NTE

South Carolina, in common with other states, requires completion of at least a bachelor's degree at a post-secondary institution as a prerequisite for certification as a school teacher.[12] However, the State has concluded that academic training is subject to too much variation from one

[10] "The evidence in the record supports the finding that South Carolina officials were concerned with improving the quality of public school teaching, certifying only those applicants possessed of the minimum knowledge necessary to teach effectively, using an objective measure of applicants coming from widely disparate teacher training programs, and providing appropriate financial incentives for teachers to improve their academic qualifications and therefore their ability to teach." NEA J. S. App. at 24a.

[11] NEA J. S. App. at 24a.

[12] A bachelor's degree was not always a prerequisite to certification. In 1945 only two years of college training were required of candidates for certification and of the certificates outstanding at that time, many were based not on regular college attendance but on attendance at one district summer school or a six week term of normal school. Ex. P-133.

institution to another for a college degree to provide a uniform measure of competence to teach[13]. Accordingly, the State also requires each person presenting himself for certification to demonstrate his knowledge of the subject matter taught in college on a battery of nationally-standardized, objective tests—the NTE. This has been a uniform, statewide requirement for all teacher candidates since 1945.[14]

The NTE were first developed in 1940 by the American Council on Education for the purpose of providing a set of standardized tests of high quality that could be used by educators to assess the quality of undergraduate teacher training. The NTE consist of two principal components: the Common Examinations that test elements of teacher training common to all fields (i.e., general education and professional education) and the 28 Area Examinations that test knowledge specifically relevant to one area of specialization (e.g., French, mathematics, physical education).[15]

[13] This conclusion has been reached in every study of the State certification program since 1941. The special committee (See n. 18, *infra.*) studying certification in South Carolina in 1941 noted:

> . . . all studies indicate great variability in educational attainment between graduates of different institutions and between individuals.

In 1968 the "Final Report" (See n. 34, *infra.*) observed:

> However it was recognized by the committee that not all four year colleges granting degrees have the same resources and strengths. Since some admission standards do not reflect a quality control, the committee felt that some other kind of quality control needs to be established for admission into the profession.

Ex. D-23; Ex. P-93, Attachment C.

[14] See opinion of the District Court, NEA J. S. App. at 3a. See also *Teacher Compensation in South Carolina, A Pioneering State Looks Ahead*, by Arthur L. Benson, Director, Teacher Examinations, Educational Testing Service, Princeton, New Jersey (Manning Deposition Ex. D-8, S-MAN-35):

> South Carolina can take pride in the fact that it was the first state to recognize the contributions which modern objective examinations can make to improving the quality of teachers and to upgrading institutional standards for teacher preparation.

[15] The record below was extensively developed with respect to the description of the NTE program, including the development, scoring, statistical properties, use, validity, and possible racial bias of the NTE, primarily in the deposition of Dr. Winton H. Manning, a vice president of ETS. *See* Manning Deposition. This deposition alone, in evidence before the court, was almost 2000 pages in length, in addition to 188 written questions on cross, 174 questions on redirect, and 54 questions on recross. *See* NEA J. S. App. at 5a-6a and 25a.

This division reflects the basic organization of teacher training programs in South Carolina and throughout the country. The court below in considering the evidence with respect to the design and construction of the NTE stated:

> The record supports the conclusion that the NTE are professionally and carefully prepared to measure the critical mass of knowledge in academic subject matter. The NTE do not measure teaching skills but do measure the content of the academic preparation of prospective teachers.[16]

A candidate's performance on the NTE is reported as a score on a scale which generally ranges from 300 to 900 points on each of the two components of the test. Composite scores are computed by adding the Common Examinations score to the Area Examination score; the range of composite scores runs from 600 to 1800.

The NTE are screened to eliminate material that might be biased against minority group students. Moreover, there are no questions that are systematically answered incorrectly by minority group persons by virtue of culture-specific usage, that is, where words used commonly have different meanings for whites and blacks. Plaintiffs' apparent recognition of the lack of cultural bias was noted by the District Court: "Plaintiffs have not contended nor proved that the NTE are racially biased or otherwise deficient when measured against the applicable professional and legal standards." [17]

[16] NEA J. S. App. at 25a.

[17] *Id.*

USES OF THE NTE IN SOUTH CAROLINA

The history of the NTE in South Carolina begins with the report of a committee of educators and citizens familiar with the problems of education, appointed by the South Carolina Legislature in early 1941 to investigate the statutes dealing with education.[18] The committee consulted many sources: educators of both races, professional associations including the South Carolina Teachers Association (the predecessor of the plaintiff SCEA in this case) and representatives of the U. S. Office of Education. This committee in a written report recommended an overhaul of numerous aspects of school administration (none of which is relevant here) and of the method of certifying teachers and allocating their State aid salary supplements.

With respect to teacher certification and salary, the committee was immediately faced with a dilemma. At the time, South Carolina had a dual teacher classification system under which blacks and whites with comparable qualifications received different salaries. The committee recognized the correctness of *Alston v. School Board of Norfolk*, 112 F. 2d 992, *cert. denied* 311 U. S. 693 (1940), a recent Virginia case declaring separate classification of teachers by race to be unconstitutional, but also realized that the quality of teachers in South Carolina was far too disparate to warrant an across-the-board equalization of salaries.[19] Specifically, only one-fourth of the black teachers and two-thirds of the white teachers held college degrees.[20] Accordingly,

[18] Report of the Committee Appointed Pursuant to Senate Resolution No. 61 (H. 74) "To Make an Investigation of the Statutory Laws of South Carolina Dealing with Education, Etc.," 1941 (Ex. No. D-23) (hereinafter the 1941 Report).

[19] "As the committee has indicated, the existing teacher certificate gave little real evidence of a teacher's value. The first grade certificates do not even represent college credits. The holder of a doctor's degree has the same certificate that thousands who have no college degree hold." (1941 Report at p. 14.)

[20] Id.

the 1941 committee recommended that an exhaustive study be conducted to determine a new method for the certification of teachers, a method which would recognize merit and in which race would not be a factor.[21]

The State Department of Education promptly implemented this recommendation by appointing a committee to produce a study on the revision of the teacher classification system. Although only passing reference is made to the study in the two Jurisdictional Statements, it was in fact conducted in the years 1942-44, using data from 7500 black and white South Carolinians, including principals, administrators, classroom teachers and pupils. The conclusion of the study, published in four hardbound volumes in 1944, was that the NTE would be a suitable means, along with a teacher's amount of education and experience, for evaluating teachers objectively.

In 1945, the State Board of Education adopted the basic recommendations of the study and implemented a certification plan involving four grades of certificates (designated A, B, C, and D) based on the candidate's NTE scores. No candidate, regardless of how low his score, was denied a certificate. There was no limit on the number of times any teacher could take the examination.[22] Concurrently with the new certification standards, the South Carolina General Assembly included in the Appropriations Act a revised state salary schedule which allocated funds to the

[21] *Id.* The District Court characterized this study as an "earnest effort in its time." NEA J. S. App. at 13a.

[22] NEA J. S. App. at 9a.

local school districts for teacher salaries on the basis of three factors.[23]

(1) the extent of a teacher's education (with classifications ranging from less than two years of college to a master's degree and later to a doctorate degree);
(2) the amount of teacher knowledge (measured by performance on the NTE); and
(3) the extent of a teacher's experience (with yearly increments for teachers with bachelor's degrees continuing until the fourteenth year).

Race was no longer a factor in determining state salary aid. Henceforth the State appropriated the same amount of money per teacher, black or white, to each school district, for each specific certification level.[24]

Plaintiffs' observation that the 1945 Certification Plan resulted in more whites than blacks receiving A and B certificates is not disputed. However, available statistics indicated that only 24% of the black in-service teachers were college graduates as opposed to 64% of the whites.[25] Thus, *any* objective measurement of the teaching force at the time was bound to reflect this disparity in educational attainment. The introduction of graded certificates did not, however, merely continue the former pay scales under a different guise. Although the United States asserts that "the certification levels of virtually all of the black educators were downgraded coincident with the [1945] elimination of the dual pay system"[26] the new certification and salary schedule was in fact predicted to result in a salary *cut* for 67% of the *white* teachers (those in the B and C

[23] The South Carolina legislature has made approximately thirty-four separate annual decisions to enact a formula for distributing State funds and for appropriating funds pursuant to that enactment. Currently, Sections 59-21-70 and 59-21-80, Code of Laws of South Carolina, 1976, set forth the formula.

[24] See footnote 3, *supra*.

[25] 1941 Report, at 11.

[26] US J. S. at 27.

classifications) and a salary *raise* for 63% of the *black* teachers.[27]

Almost immediately after the new certification system was put into effect, a class action was brought to challenge the salary schedule in one county (the county portion of teachers' salaries was not subject to the new State system). The Federal District Court (Judge Waring), by way of comparison, examined the new State certification and salary system, noting that:

> The concern of this court is whether it is free from the tinge of racial prejudice, and I find it so to be.[28]

and concluding that while the prior dual pay system was arbitrary the new system had "eliminated entirely any danger of disparity or discrimination by reason of race or color."[29]

In 1957, the concept of a cutoff score, below which candidates would not be certified, was introduced in a limited fashion. The cutoff score was 332, only 32 points above the minimum score of 300. This change eliminated very few candidates—less than 1% of the white candidates and less than 3% of the black candidates—and the score fell in the bottom 1% in the national percentile rankings.[30] In considering the 1957 decision, the District Court observed:

> Again we find nothing in the record to support a finding of discriminatory intent . . . [T]he State

[27] See tables on pp. 8 and 22, US J. S. 37% of the black teachers (those in the D classification) were predicted to receive a salary cut of 75 cents per month. As it turned out, both races scored higher than predicted in the first official administration of the test in 1945. The above figures are used, however, because they are the ones relevant to intent.

[28] *Thompson v. Gibbes*, 60 F. Supp. 872, 876 (EDSC 1945).

[29] *Id.*, at p. 878.

[30] See NEA J. S., at 10, n. 13. Between July 1, 1957, and July 1, 1969, the Board denied D certificates to persons scoring below 332 on the Commons. This score requirement was so low however that it had almost no exclusionary impact. An ETS commentator noted in the 60's that the score should be raised "to a point where the achievement of this license to practice will promise at least minimal literacy." Ex. D-8, S-MAN-35.

> Board did not move to change the system when it discovered that very few blacks were excluded, and significantly this system was maintained for over 11 years.[31]

In 1969, a more substantial change took place in the State's method of certifying teachers and determining State aid salaries. By that time, C and D teachers were entering the job market in numbers far exceeding the demand for them.[32] Moreover, enough teachers with bachelor's degrees were entering the market to fill all positions, a significant change from the situation which existed in 1945. In addition, both the General Assembly and the Governor were interested in upgrading South Carolina teachers' salaries to the southeastern average.[33]

A committee of 41 persons, including a number of black educators, was appointed in late 1967 to study the possibility of raising teachers' salaries and revising the certificaity procedure.[34] In 1969 this committee recommended the use of the composite examinations (i.e., including the teacher area examinations) for the first time, with the standard, or professional, certificate requiring a 975 score. In most teaching areas, this score was still no higher than the 10th percentile nationally.[35] The abolition of the graded

[31] NEA J. S. App. at 14a.

[32] For instance, in one year alone, 1966-67, over 280 newly certified C and D teachers entered the job market. Ex. P-104. However, by 1975-76, only 399 C teachers and 31 D teachers remained in the teaching force. Ex. P-139.

[33] Ex. P-91; P-M-32.

[34] Teacher Certification and Salary Study Committee, Final Report (Curry McArthur, Chairman), August 15, 1968, Ex. P-93, Attachment C. NEA J. S. App. at 14a-15a, 21a-23a.

[35] NTE Technical Handbook, Ex. D-8, S-MAN-9.

certificate system was also recommended.[36] In addition, the committee recommended that "warrants," or provisional certificates, be issued for persons scoring between 850 and 975.[37] By permitting persons with NTE scores of as low as 850 (out of a possible 1800, with 600 the minimum possible score), to teach, the committee descended to the 4th or 5th percentile of applicants nationally.[38] In a significant change from past procedure, however, the committee recommended that substandard (i.e., warrant) teachers be paid the same as fully certified teachers, with step increases each year for the first five years.[39] The warrant teacher was thus given a five-year opportunity to improve his knowledge of subject matter without being penalized financially in the meantime. The State Department of Education in 1969 adopted and implemented the committee's recommendations, effective July 1, 1969. The new scores eliminated 30% of the black candidates and 1% of the white candidates for certification.[40] However, no comparable disparity was created in the actual teaching force in South Carolina. Six years after the new scores had been im-

[36] "It was reasoned that the conditions which made the grading of certificates sensible in 1945 no longer exist and that those who meet the minimum requirements for a professional certificate in South Carolina should not have their credentials graded A, B. C, and D, but should be issued the same credential with the same amount of State aid allotted." Ex. P-93, Attachment C, at 4.
As was previously noted *supra*, at p. 8, in 1945 a substantial number of the State's teachers did not have a four year bachelor's degree.

[37] Plaintiffs' statement that the warrant is a "temporary" certificate (US J. S. at 11) is inaccurate. The warrant is renewable on the same basis as the professional certificate. Ex. P-133.

[38] NTE Technical Handbook, *supra*, n. 35.

[39] Ex. P-93, Attachment C, at 11.

[40] Plaintiffs concede that "this was the first use of the NTE by the State to exclude an appreciable number of candidates." NEA J. S. at 10.

plemented blacks constituted 29.3%[41] of the teachers in a State with a 30.5% black population.[42]

The District Court specifically considered the evidence with respect to this revision in the certification requirement (the requirement of a composite score on the NTE, the use of the warrant credential and the cessation of graded certificates) and concluded:

> We are unable to find any intent to discriminate with respect to this decision. Plaintiffs offer no direct evidence of such an intent, even though one obvious source, the black members of the committee, was apparently available to them. The State's authority to redefine minimal competence from time to time cannot reasonably be questioned.[43]

THE VALIDITY STUDY AND THE 1976 CERTIFICATION REVISION

In late 1975, several months prior to the commencement of this lawsuit, the State entered negotiations with ETS to have a validation study of the NTE conducted. As a result, ETS proposed and the State accepted a study based on a design later described as "pioneering" by the principal author of the APA Standards and Principles for the Validation and Use of Personnel Selection Procedures.[44]

[41] NEA J. S. App at 10a.

[42] *Id.* The percentage of blacks in the employment pool is much lower than the percentage of blacks in the total population. See, *infra*, at 24, n. 11.

[43] NEA J. S. App. at 15a.

[44] The witness, Dr. Robert Guion, described the study as being "a pionering kind of design," which, using "a very creative method," did a "thorough job in laying out the issues that have to be considered and establishing an operating cutoff score which is a policy decision, not a technical one." When asked whether the design was professionally aceptable, Dr. Guion responded:

> I thought it went beyond what would be called "professionally acceptable" . . . . I would characterize as professionally acceptable in quotes as being something minimally acceptable or something of that sort. And this would certainly be more than that.

Ex. D-5 at 24, 34.

The study was designed to address: (1) the relationship between the content of the test and the content of teacher training programs within the State, and (2) the level of performance on the NTE that might be expected of a candidate who is judged to have the minimum amount of knowledge necessary to complete an academic program in teacher education in South Carolina and to teach effectively in the schools of South Carolina. It was planned and prepared by eighteen professional staff members of ETS, supervised by an ETS vice president, Dr. W. H. Manning,[45] and reviewed and approved by four independent professionals in the field of testing and measurement. Four hundred and fifty-six (456) black and white educators, nominated by the faculties of the teacher training institutions in South Carolina, participated in the validity study. The educators were constituted into panels of professional "juries" to evaluate the NTE as a measure of minimal mastery of the subject matter taught in the teacher training programs throughout the State. A considerable body of professional literature supported this kind of approach to content validation. All four of the independent experts who reviewed the design of the study were uniformly complimentary.[46]

The panel responses were collated and evaluated by using generally accepted psychometric techniques. The results of the three-month study are set forth in a 300-page report, delivered to the State Board of Education in January, 1976.

[45] The expert qualifications of Dr. Manning are set forth in detail in his deposition, Ex. D-8, at 16-18, and are supplemented by a list of his publications contained in Ex. D-8, S-MAN-1.

[46] Each of the four experts submitted detailed comments to ETS. Letter from Linn to Stuart, dated September 27, 1975; letter from Linn to Stuart, dated November 24, 1975 (Ex. D-8, S-MAN-18); letter from Krathwohl to Masonis, dated October 5, 1975; letter from Krathwohl to Masonis, dated October 27, 1975 (Ex. D-8, S-MAN,19); Guion Deposition, pp. 23-26 (Ex. D-5); Manning Deposition, pp. 260-263, 893-922 (Ex. D-8).

The validity study showed that in general between 85% and 90% of the questions on the NTE were appropriate for use in measuring the content of teacher training programs in South Carolina.[47] Moreover, the study concluded that in most teaching areas (agriculture being the only exception) a score considerably higher than the 975 set in 1969 was necessary to indicate that a prospective teacher possessed the minimum level of academic knowledge to teach.[48]

After additional study by the standing committee on Teacher Recruitment Training and Compensation and the department staff, the State Board established new minimum composite scores, one, two, or three standard errors of measurement *lower* than those that were supported by the validity study,[49] and eliminated entirely the provisional or warrant certificate. In reaching these decisions the State Board (which is biracial) considered sampling error in the validity study, consistency of results, supply and demand for teachers, racial composition of the teaching force and

[47] Ex. D-8, Manning Deposition, S-MAN-32C.

[48] NEA J. S. App. at 36a.

[49] The committee's study analysis and procedures are set out in a lengthy report to the State Board of Education which is part of the record. Report of the Committee on Teacher Recruitment, Training and Compensation. (Ex. D-28, D-32.) *See also* NEA J. S. App. at 3a and 35a.

effect on teacher training programs.[50] These new scores reflect great caution, with the obvious effect of possible over-inclusion of candidates in the teaching force rather than under-inclusion.[51] With respect to the 1976 scores the District Court stated:

> [T]he actions of the State Board in lowering the scores recommended by the study to account for various statistical and human factors were reasonable, and, as before stated, provide and compensate for a substantial margin of error.[52]

[50] The resulting scores are as follows:

Area	*Study Score*	*New Score**	*SEM Units*
Agriculture	1006	940	—2
Art Education	1104	1040	—2
Biology and General Science	1196	1115	—3
Business Education	1167	1071	—3
Chemistry, Physics, and General Science	1158	1100	—2
Early Childhood Education	1124	1052	—2
Education in the Elementary School	1194	1132	—2
Education of the Mentally Retarded	1234	1120	—3
English Language and Literature	1069	1041	—1
French	1210	1144	—2
Home Economics Education	1143	1075	—2
Industrial Arts Education	1162	1100	—2
Mathematics	1203	1113	—3
Librarian-Media Specialist	1238	1178	—2
Music Education	1086	1020	—2
Physical Education	1195	1125	—2
Social Studies	1148	1086	—2
Spanish	1163	1132	—1
Common Examinations	548	510	—2

* Out of 1800 maximum.

[51] After reduction of the cutoff score by two standard errors of measurement below the score supported by the study, the minimum score requirement involves a risk of not certifying a maximum of two candidates per hundred who are actually minimally qualified. Reduction by three standard errors of measurement puts the risk at less than one per thousand. The quantification of the risk at one, two and three SEM below the scores reported in the ETS study is set out in Ex. D-8, S-MAN 32A, Table 33, at 124.

[52] NEA J. S. App. at 39a.

GROUNDS FOR GRANTING THE MOTION TO AFFIRM

Although there are hosts of major and minor points in dispute between the Plaintiffs and the State Defendants in this case, the approach taken in the decision below narrows the issues that must be considered by the Court at this stage of the appeal. The District Court reached two conclusions of primary importance: (1) that South Carolina's use of the NTE has had no racially discriminatory purpose, and (2) that the NTE have been properly validated as measures of job-related knowledge. The combination of these two conclusions is decisive. If there is no discriminatory purpose behind the use of the NTE *and* if the NTE are valid measures of job-related knowledge, the Plaintiffs' case collapses on any legal theory available to them. Therefore, in deciding whether this appeal merits plenary review, the Court need only look to the District Court's decision on these two critical points. If it is satisfied that the lower court did not commit reversible error in reaching either conclusion, summary affirmance is warranted.[1]

[1] This Court's task is further simplified by the fact that the following points were not disputed by any party in the Court below:
(1) Knowledge of the subject matter taught in college-level teacher training programs in South Carolina is a "job-related" qualification for teaching.
(2) The NTE themselves are not culturally or racially biased.
(3) The NTE have a differential impact upon blacks and whites in South Carolina.
(4) Prior to 1945 South Carolina maintained a dual system of teacher classifications.

I

The District Court was not "clearly erroneous" in finding no discriminatory purpose, in view of evidence that South Carolina's system of teacher certification and its formula for State salary supplements (1) are the result of a consistent program since 1941 to improve the quality of public education in the State; (2) were instituted, in part, for the express purpose of ending the previous system of dual classification of black and white teachers; (3) have been accomplished with the assistance of black educators in the State, the federal government, national education associations, and independent experts in education testing; and (4) have consistently resulted in a percentage of black teachers substantially equal to the percentage of total black population in the State.

On the issue of discriminatory intent, a reading of the opinion below reveals that no substantial questions of law are presented for decision by this Court. The opinion of the District Court applied precisely the legal theories which Plaintiffs contend are applicable.[2] All that remains is a factual dispute, which was resolved by the District Court in favor of the Defendants, but which Plaintiffs seek to relitigate here.

A fair reading of the opinion of the District Court demonstrates that the Defendants were required to, and did, bear the burden of showing nondiscriminatory pur-

[2] NEA J. S., at 23-25; US J. S., at 20-21, 28n. 30.

pose in response to the *prima facie* case of the Plaintiffs.[3] The District Court did entertain appropriate inferences based on the Plaintiffs' evidence standing alone but was convinced by massive evidence introduced by the Defendants in rebuttal that racially neutral purposes lay behind the State's use of the NTE.

In its discussion of the certification issue, the Court said, "Although the historical background of segregated schools might provide some basis for the inference urged by Plaintiffs, any such inference has been rebutted" (NEA J. S. App. at 13a). And with respect to the use of certification to allocate salary supplements, the Court found, "We are unable to find a discriminatory intent from these facts, even though the historical background . . . provide[s] some support for such an inference. Such inference is adequately rebutted by the evidence with respect to what the legislature actually did." (NEA J. S. App. at 21a.) Such language cannot be read as leaving the burden on the Plaintiffs. The State never disputed its burden of coming forward with rebuttal evidence on the question of intent and produced full evidence on the question. Consistent with the standard set forth in *Keyes v. School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973), the District Court required that the State rebut Plaintiffs' case not by showing that it was

[3] NEA J. S. App., at 9a-17a. The State assumed the burden upon a *prima facie* showing that the NTE show a significant statistical disparity by race, and that prior to 1945 South Carolina had a dual system of teacher classification based on race.

The Plaintiffs' claims that the 1976 scores would eliminate up to 100% of the otherwise qualified black candidates (US J. S., at 15) and entrust teaching in South Carolina exclusively to the white race (NEA J. S., at 21) rest on a data base of two (2) persons who failed to meet the new scores on two of the area exams (Spanish, and Chemistry, Physics and General Science). Ex. P-80B. The State Defendants dispute Plaintiffs' characterizations of the impact that the NTE has on black candidates. Their figures are statistically unreliable and the conclusions they draw from them are inaccurate. Plaintiffs' breast beating on this point throughout the litigation is undeterred by the fact that South Carolina is one of only a few states where the percentage of black teachers has always approximated or exceeded the percentage of blacks in the population.

merely *rationally conceivable* that certification and salary formula were based on nondiscriminatory motives, but by showing that the *actual* intent was nondiscriminatory.[4]

While some of the District Court's language refers to the absence of direct evidence for Plaintiffs, none of these statements is inconsistent with proper application of the evidentiary rules Plaintiffs now invoke. Thus, with respect to the 1969 decision to abolish graded certificates, the Court said, "Plaintiffs offer no direct evidence of such an intent, even though one obvious source, the black members of the committee [that recommended the change in the certification system], was apparently available to them." (NEA J. S. App. at 15a.) Although phrased in terms of the lack of direct evidence, this statement simply expresses the Court's finding that the inference of discriminatory intent was rebutted in part by the inference that normally arises from a failure to produce available witnesses. Similarly, other such passages (e.g., NEA J. S. App. at 16a-17a) show only that the Court's conclusion that "the Plaintiffs have not demonstrated the required discriminatory intent" (NEA J. S. App. at 16a) is, in light of all the Court's other statements, nothing more nor less than a finding that the facts taken as a whole—the Plaintiffs' inferences on one hand, the State's evidence on the other—favored the State.[5] While the law requires that the burden shift to the defendant to rebut a *prima facie* showing by the plaintiff on the

[4] The United States actually admits that the burden was shifted in its description of the opinion below: "In each case, the court found a lack of 'direct evidence' of intentional discrimination *and that any inferences* of such discrimination *had been rebutted* . . . by the State." US J. S., at 15-16 (Emphasis added).

[5] This Court has used similar language to the same effect in its own decisions. In reviewing the record in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 270 (1977), the Court stated:

> In sum, the evidence does not warrant overturning the . . . findings . . . below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision.

issue of intent, the law does *not* require that the Court treat such a showing as an irrebuttable presumption. None but the most selective reading of the District Court's opinion can fail to disclose that the Court required the State to carry the burden of rebuttal on the question of intent and that the State did so to the Court's satisfaction.

Nor does the opinion below indicate that the District Court viewed the series of decisions regarding the NTE made by the State Defendants from 1945 to 1976 in isolation.[5a] Indeed, the Court expressly noted its awareness of the necessity of viewing the events in sequence, as required by *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U. S. 252, 267 (NEA J. S. App. at 9a), and looked at the State's decisions in sequence and historical context. For example, the District Court carefully examined the preceding events in addressing the 1976 decision to abolish all substandard certificates. (NEA J. S. App. at 16a.) The District Court did not find "a series of official actions taken for invidious purposes,"[6] but rather a series of official actions based upon legitimate, nondiscriminatory motives. The Court did not fail to consider the historical pattern of conduct by State officials, but rather found it a pattern of neutral decision-making. Plaintiffs' disagreement is with this factual determination by the trial court.

The District Court, applying the appropriate legal standards and having considered the massive evidence introduced by the State on the question of intent, concluded that the State's decisions regarding adoption and use of the NTE "were not motivated by an intent to discriminate because of race" and there was "no indication whatsoever

[5a] "Compartmentalized," in the Government's language. US J. S., at 16.

[6] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 267 (1977).

that the State and its officers were motivated by anything more than a desire to use an accepted and racially neutral standardized test to evaluate . . . teacher applicants." (NEA J. S. App. at 12a, 17a.) Amazingly enough, Plaintiffs seek to challenge this factual determination with their own proposed findings of fact,[7] which were submitted to, considered, and rejected by the District Court at trial. The proposition that factual determinations made by the trial court cannot be retried on appeal unless "clearly erroneous" hardly bears repeating. *See,* e.g., *Zenith Corporation v. Hazeltine,* 395 U. S. 100, 123 (1969).

The District Court's finding of a racially neutral purpose behind South Carolina's use of the NTE is amply supported by the record. It has already been noted[8] that in 1945 the teaching force of South Carolina, black and white, contained large numbers of persons without college degrees, that the quality of teacher training programs then and now has been widely disparate, that the 1945 certification system, the first in the nation to use the NTE, was predicted to result in pay cuts for 67% of the white teachers and raises for 63% of the black teachers, that in 1945 a Federal District Court found the new program to be racially neutral, and that by national standards the achievement required for South Carolina's top certificate was exceedingly low and was even lower for the substandard certificates. Moreover, the 1941 legislative committee report, which first noted the need for racially neutral teacher classification and which the District Court referred to as "an earnest effort in its time" (NEA J. S. App., at 13a), demonstrated the State's effort to improve the quality of education while eliminating racial distinctions in teacher certification and salary.[9] The report also discloses the committee's consulta-

[7] *See,* NEA J. S., at 6-16; US J. S., at 5-15.

[8] *Supra,* at p. 8-12.

[9] NEA J. S. App. at 13a.

tion with a number of black educators on the changes to be made.[10] In addition, and as the Court noted (NEA J. S. App. at 10a), the racial composition of the State's teaching force has at all times "closely paralleled" that of the State population as a whole.[11] With respect to the 1969 changes

[10] *Supra*, at p. 8.

[11] Both Plaintiffs (US J. S., at 18, NEA J. S., at 21) note the decline in the percentage of black teachers over the years but fail to mention the nearly identical decline in the black opopulation of the State.

The District Court specifically noted that during the period from 1945 to the present:

> The record before us indicates that during this period, the racial composition of the South Carolina teacher force has closely paralleled the racial composition of the State's population. The 1950 census estimated that 61.1% of the population was white and 38.8% was black. In 1953-54, the State employed a teacher force that was 58% white and 42% black. The 1960 census showed a population that was 65.1% white and 34.9% black. In 1966-67, the teacher force was 65.6% white and 34.4% black. The 1970 census showed a population that was 69.5% white and 30.5% black. In 1975-76, the teacher force was 70.1% white and 29.3% black. NEA J. S. App. at 10a.

If comparison is made between the percentage of blacks in the teaching force and the percentage of blacks holding college degrees in South Carolina, the statistics are even more favorable to the State, as shown by the table below:

Year	*Total Persons with 4 Years College*	*Non-Whites with 4 Years College*	*Non-Whites Percentage with 4 Years College*	*Non-Whites, Percentage in Teaching Force*
1940	39,399	3,004	.94	37.5
1950	54,220	5,020	1.75	40.9
1960	78,244	10,151	3.03	38
1970	115,119	13,279	4.01	*

* in 1970 no statistical breakdown by race was made of the South Carolina teaching force. However, in 1975-76, the figure was 29.3.

(Source: *U. S. Census of Population: 1950*, Vol. II, Characteristics of the Population, Pt. 40 South Carolina, B, Tables 16, 20; 40-26, 32, 33. *U. S. Census of Population: 1960*, Vol. I, Characteristics of the Population, Part 42, South Carolina, Tables 15, 47; 42-22, 42-96. *U. S. Census of the Population: 1970*, Characteristics of the Population, Pt. 42, Table 46, 42-134; South Carolina, Tables 19, 46; 32-43, 134; Ex. P-93, Attachment A.

in the certification system, it has already been mentioned[12] that black educators participated in those decisions and that the 1968 study committee was concerned with helping those with low test scores to upgrade their certificates rather than with "decimating" the black teaching force. With respect to the 1976 revision, it is undisputed that the decision was based on the expert advice of ETS in light of the NTE validity study, and not on any discriminatory purpose.[13]

The findings of the District Court were made on a massive record. Plaintiffs seek to have this Court review the whole of this record and reach factual conclusions different from those reached by the District Court. The District Court applied the correct legal standards and was convinced by the State's case. This factual determination was not clearly erroneous and Plaintiffs are not entitled to a second trial in this Court.

[12] *Supra*, p. 12.

[13] The Summary of a Report on a Study of the Use of the National Teacher Examination by the State of South Carolina (Manning Deposition, Ex. D-8, S-MAN-32C) stated:

> Based on the judgments of the Knowledge Estimation Panels, a composite score representing the minimum level of academic knowledge that should be necessary for completing teacher training programs and teaching effectively in South Carolina can be set for each of the subject areas covered by the NTE examinations. These composite scores of minimally qualified candidates are set forth in the report, and range from 1006 for Agriculture to 1238 for Media Specialist. In setting a minimal qualifying score as part of the initial certification process, the State can adjust the scores identified by the study by reference to other considerations arising from the measurement process and by reference to other legitimate educational objectives also discussed in the report.
>
> Final determination of the minimum composite scores to be used is the responsibility of the South Carolina State Board of Education and consequently this question cannot be resolved by the data from this study alone. The report provides guidance to the State in addressing this question and the results of the study can effectively contribute to the decision that the State must make concerning the use of the NTE as various factors are weighed by the Board in setting standards for teacher certification in South Carolina.

II

Because there is a manifest relationship between knowledge of subject matter and ability to teach, the District Court was correct in finding that the State may consider mastery of subject matter, as measured by a professionally validated examination, as a factor in certifying teachers and allocating money to supplement their salaries.

A. *A State is Entitled to Consider Mastery of Subject Matter in Certifying or Setting Salary Levels for Teachers.*

A teacher is one who imparts or conveys knowledge to another. South Carolina requires one who would be a teacher in its public schools to demonstrate knowledge in the three basic areas covered by teaching programs within the State: (1) general education, (2) professional education, and (3) teacher specialty education. The proposition that knowledge in these areas is manifestly related to job performance as a teacher has not been disputed in this litigation.[14] South Carolina assumes that one who is to impart knowledge as a teacher must possess that knowledge himself. It is also assumed that the minimum amount of knowledge required to be an acceptable teacher is something more than the knowledge merely required to teach a given lesson on a given day. In this respect, public school teaching, which involves extensive interaction with young

[14] South Carolina requires all applicants for teacher certification to have completed a minimum of a bachelor's degree at an approved teacher training institution within the State or at an accredited institution outside the State. The Plaintiffs concede that this requirement is lawful and proper in order to insure that public school teachers have the knowledge necessary to teach. Indeed, they contend that graduation from a teacher training program is sufficiently job-related to be the only qualification necessary for certification as a teacher. (NEA J. S., at 33; US J. S., at 32.) Their position demonstrates that Plaintiffs themselves recognize that the subject matter taught in the State's teacher training institutions constitutes job-essential knowledge which a teacher may be required to master before being entrusted with the education of the State's children.

people, is unlike a job in which knowledge of a specific manual skill will tend to insure acceptable performance regardless of whether the applicant is well versed in any area of knowledge beyond the immediate task. South Carolina does not assume that a minimum level of knowledge in itself guarantees effective teaching, but it does know that knowledge gained through academic preparation in the basic areas outlined above is a key element for effective teaching, if not its *sine qua non*.

It cannot reasonably be disputed that the State may use knowledge of subject matter as one criterion for certification of teachers. This Court and others have repeatedly sustained the right of the State to require a minimum standard of knowledge as a prerequisite to licensure in the learned professions.[15] In view of the overwhelming authority on this point, it would seem frivolous to argue that South Carolina may not require teacher candidates to demonstrate a minimum mastery of subject matter on an examination before they are certified. As the Fifth Circuit has stated in discussing bar examinations:

> If a state has the right to insist on a minimum standard of legal competence as a condition of licensure, it would seem to follow *a fortiori* that it may require a demonstration of such competence in an examination designed to test the fundamental ability to recognize and deal with legal principles.[16]

[15] *See*, e. g., *Dent v. West Virginia*, 129 U. S. 114 (1889) (medicine); *Stephens v. Denn* 293 F. Supp. 589 (N. D. Ala. 1968) (pharmacy); *Lombardi v. Tauro*, 470 F. 2d 798 (1st Cir. 1972), *cert. denied*, 412 U. S. 919 (1973) (law); *Graves v. Minnesota*, 272 U. S. 425 (1926) (dentistry); *Williamson v. Lee Optical, Inc.*, 348 U. S. 483 (1955) (optometry); *England v. Louisiana State Board of Medical Examiners*, 246 F. Supp. 993 (E. D. La. 1965), *aff'd mem.*, 384 U. S. 885 (1966) (chiropractic medicine); and *Milner v. Burson*, 320 F. Supp. 706 (N. D. Ga. 1970) (driver training instruction).

[16] *Tyler v. Vickery*, 517 F. 2d 1089, 1101, *cert. denied*, 426 U. S. 940 (1976).

Likewise, mastery of subject matter may properly be considered as a factor in allocating funds to supplement salaries. In *National League of Cities v. Usery*, 426 U. S. 833, 848 (1976), this Court, speaking of the interest of States in structuring pay scales for public employees, stated:

> The State might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements and pay them less than the federally prescribed minimum wage.[17]

Although the federal minimum wage is not at issue here, the considerations described in *Usery* led to the decision to adopt the State salary supplement formula. Put simply, the issue is whether South Carolina may pay less money to persons who do not possess the minimum knowledge necessary for full certification, if it does so without discriminatory purpose and if it uses a fair and accurate measure of minimum knowledge. The District Court concluded that South Carolina may lawfully distinguish between teachers who are academically qualified and those who are not in structuring pay scales.

In 1945, when the salary formula was established, many teachers in South Carolina did not have a college education.

[17] The commonsense proposition that salaries of teachers may rationally and constitutionally be based on differences in individual attainment and worth has long been recognized; *See*, e. g., *Morris v. Williams*, 149 F. 2d 703 (8th Cir. 1945) (dicta). It is equally settled that teaching is a profession in which the same basic duties may be performed more effectively by one person than by another and that the more effective teacher may be paid more; in other words, the equivalence of positions does not import an equivalence of persons filling them. *Mills v. Board of Education*, 30 F. Supp. 245 (D. Md. 1939) (dicta); *Morris v. Williams*, *supra*.

Because South Carolina faced a severe teacher shortage,[18] it was necessary to employ teachers with less than full certification, although even at that time it was recognized that the system of substandard certificates should eventually be abolished.[19] The effect of the salary allocation formula has been to draw a distinction in pay scale between those who have demonstrated minimum knowledge on the NTE and those who have not. These teachers are not placed in the full salary bracket for State aid until such time as they demonstrate sufficient knowledge to become fully certified.

There are several reasons why tying increases in salary to demonstration of knowledge makes good sense. First, knowledge, while not the only attribute of an effective teacher, is the *sine qua non* of teaching effectiveness. Knowledge does not necessarily come with teaching experience. Experience can improve many facets of a teacher's classroom performance (and accordingly is compensated by the salary schedule), but there is nothing in the teaching of many subjects, particularly at the elementary level, which necessarily adds to an adult teacher's knowledge of subject matter or teaching methods where such knowledge has previously been lacking. For instance, one can muddle through a year of teaching third grade history without being exposed to any more history than is found in the third grade history book; and yet effective teaching of such a subject certainly requires a broader knowledge than that.

[18] For example, in 1946 the teacher supply was said to have reached an all time low. (Exhibit No. P-132 at 73(b).) The "acute shortage" of elementary teachers was termed "startling" in 1949. *See 1949 Annual Report of the Division of Teacher Education and Certification* at p. 7-8.

[19] E. R. Crow, a member of the 1941 committee to study education in South Carolina and a member of the State Board in the forties, wrote in a 1947 article: "A prediction is ventured, based on opinion only, that after a few years when the supply of teachers is more nearly adequate, the function of the examination in certification will be to secure the elimination of applicants below certain educational levels." Ex. D-8, S-MAN-23, p. 462.

Second, even if knowledge did come with experience, there is nothing about experience which makes performance on the NTE more difficult. The NTE are designed to measure knowledge related to the job of teaching. They have been validated for that purpose.[20] If an experienced teacher possesses such knowledge, that teacher can demonstrate the knowledge on the NTE, which is specifically designed to measure it.[21]

Third, it is difficult to see how improvement in the amount of knowledge possessed by teachers holding substandard certificates could occur without the incentive of higher salaries. The equalization of salaries, which the Plaintiffs apparently prefer, would only have perpetuated the inferior levels of communicative ability and general knowledge which have plagued the education of the youth of South Carolina, black and white, for so many years. As the District Court recognized:

> There appears to be no alternative available to the State, within reasonable limits of risk and cost, for providing the incentive necessary to motivate thousands of persons to acquire, generally on their own time and at their own expense, the necessary additional academic training so that they will be minimally competent teachers. Having made

[20] The validation of the NTE as measures of knowledge is discussed *infra* at pp. 35-38.

[21] The record contains no objective evidence to the contrary. Plaintiffs argued strenuously below that the NTE are not designed to be used for in-service evaluation of teaching performance, placing heavy reliance on objections raised by ETS after 1970 that the NTE were not designed to set salaries for experienced teachers. As the District Court apparently perceived, Plaintiffs' argument is beside the point. ETS Guideline (c)(6) recognizes that an experienced teacher's knowledge of a subject matter is properly measurable by the NTE (citing the example of an experienced teacher who wishes to teach a different subject).

(Note continued on following page)

> the investment of four years in an undergraduate education, it seems reasonable to try to upgrade the talent of unqualified teachers where possible, rather than rejecting them altogether.[22]

Since it is manifest and undisputed that mastery of knowledge at the college level of education is substantially related to the job of teaching, the critical issue in this case is: have the NTE, which purport to measure mastery of subject matter learned in college training programs, been validated for that purpose. The District Court, following the standards of Title VII,[23] as articulated by this Court in *Washington v. Davis,*[24] found the NTE valid.

B. *The Defendants Clearly Established Below that the NTE Fairly and Accurately Measure Mastery of Subject Matter Taught in Teacher Training Programs in the State of South Carolina.*

The District Court began its analysis by stating that

Dr. Winton H. Manning, a vice president of ETS, testified as follows:

> Q. Can your National Teachers Examinations be used with teachers, with teachers who have had some teaching experience?
>
> A. Well, they are not designed for use in the evaluation of experienced teachers or teachers with in-service assessments of performance on the job. They could be used for certain purposes *for the assessment of knowledge of even those teachers who have had some experience*, and they could also be used where on-the-job experience has been extremely limited or where none has been possible or where it becomes administratively impractical or impossible as in the instance of the teacher who may be moving into a state from other parts of the country and where the accessibility of records of in-service teaching performance are simply not available.

Manning Deposition, pp. 48-49, Ex. D-8 (emphasis added). Experienced persons in other professions, including law, are often required to take certification examinations. Courts have sustained such requirements against legal challenge. *See, e. g.* (*In re Stephenson,* 511 P. 2d 136 (Alaska 1973).

[22] NEA J. S. App., at 43a.

[23] The State defendants do not concede that the United States has standing to bring a "pattern or practice" suit under Title VII, nor do they concede that they are "employers" within the meaning of Title VII, nor that a mere showing of disproportionate racial impact without a showing of discriminatory intent is sufficient to constitute a violation of Title VII.

[24] 426 U. S. 229 (1976).

Plaintiffs' evidence of differential racial impact of the NTE shifted the burden of proof to the State to demonstrate that the NTE are a valid measure of job-related knowledge.[25] The Court noted "Plaintiffs have not contended or proved that the NTE [themselves] are racially biased. . . ." [26] Thus, the issue for decision was whether the NTE were otherwise a fair and accurate measure of knowledge that could reasonably be required for the job of teaching. The Defendants assumed the burden of demonstrating the validity of the NTE by introducing the professionally designed and administered validity study described above.[27]

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[25] NEA J. S. App., at 33a.

[26] NEA J. S. App., at 25a.

[27] To our knowledge, this is the only case involving the NTE in which a validity study has been introduced. The NTE cases cited by the Government are all distinguishable on that essential point. The NTE cutoff score considered in *Baker v. Columbus Municipal Separate School District*, 462 F. 2d 1112 (5th Cir. 1972), was established "without any investigation or study of the validity and reliability of the examination or the cut-off score . . . ." 462 F. 2d at 1114. The Court acknowledged, however, that

> a school district has the responsibility of providing the best possible education for its pupils; including efforts to constantly improve its faculty. When a test has a valid function in such a process and is fairly applied to all teachers, it outweighs the fact that it may result in excluding proportionately more blacks than whites. 462 F. 2d at 1115.

In *Walston v. County School Bd. of Nansemond County, Va.*, 492 F. 2d 919 (4th Cir. 1974), the Court enjoined the use of a minimum NTE score requirement on the ground that no evidence of validation had been presented. The Court noted,

> [I]t may well be that when properly and fairly applied in appropriate situations, the NTE could qualify as having the "demonstrable relationship' . . . so essential to ensure equal employment opportunity. 492 F. 2d at 927.

In *United States v. Chesterfield County School District*, 484 F. 2d 70 (4th Cir. 1973), the Court condemned the use of an NTE-based certification system that prevented the rehiring of some black teachers, but *not* because it found reliance on teachers' scores objectionable. A grandfather clause in the certificate classification procedure had created the anomaly that some teachers who were rehired actually had lower NTE scores than the teachers who were dismissed. The Court found untenable the uneven application of the objective standard, and expressly did not reach the issue of the propriety of using the NTE.

There was no validity study at all in *Morgan v. Kerrigan*, 509 F. 2d 580 (1st Cir. 1974).

(Note continued on following page)

The evidence discloses that the NTE are well-developed tests. They have been given several times a year in each year since 1940. Since 1963 they have been revised and updated continuously by means of a detailed, careful, professional process. Over 150 independent experts have contributed to the design of specifications or the formulation of questions in the past five years alone. In addition, 12 ETS testing and subject matter experts are assigned to the NTE program and these experts are provided support by ETS's extensive research effort on all aspects of testing.[28] Unlike "Test 21" in *Washington v. Davis*, the NTE are not merely generalized measures of verbal ability and reading comprehension, but have been carefully and specifically designed to test knowledge of the psychological and sociological foundations of education, the methods and principles of teaching, and the specific subject to be taught (art, reading, mathematics, etc.). Plaintiffs make no argument that this knowledge is not essential to effective teaching. The study demonstrates that the NTE consist of suitable samples of this essential knowledge.[29]

Pickens v. Okolona Municipal Separate School District, 3 Race Relations Law Survey 180 (1971), is reported only in bare summary. In a subsequent proceeding, however, the District Court referred to that case as "legally indistinguishable" from *Baker, supra. See Pickens v. Okolona Municipal Separate School District*, 380 F. Supp. 1036, 1039 at n. 5 (N. D. Miss. 1974), *aff'd*, 527 F. 2d 358 (5th Cir. 1976).

Georgia Association of Educators v. Nix, 407 F. Supp. 1102 (N. D. Ga. 1976), dealt only with Georgia's use of the NTE to establish a salary "supergrade" for teachers scoring above 1225.

The Government's statement that prior to this case "the courts had consistently struck down such uses of the NTE as racially discriminatory" (US J. S. at 20) is simply not accurate.

[28] The process by which the Common Examinations are developed is described in detail in the Manning Deposition. The members of the committee of commissioners for reviewing tests in the NTE Program were identified in Ex. D-8, S-MAN-4. The outside experts who have written questions during this period are listed in Ex. D-8, S-MAN-7. The qualifications of the ETS staff experts assigned to the NTE Program are set out in Exhibits D-8, S-MAN-6 and S-MAN-40.

[29] *Supra*. pp. 14-17.

In addition, the District Court had before it evidence that the United States Civil Service Commission has adopted the NTE for use in evaluating applicants for teaching positions in the federal civil service. A study was conducted by the Commission which concluded that the NTE were valid.[30] The Commission has made extensive use of the tests and has set cutoff scores far above the level set by South Carolina.

The District Court not only considered the evidence in support of the NTE, but also carefully reviewed a multitude of detailed, technical objections of the Plaintiffs to the validity study. Plaintiffs once again challenge the District Court's evidentiary findings on these detailed points on appeal.[31] For example, NEA argues that the validity study was defective because some participating panel members had not taught particular subject matters in the classroom. This issue was argued extensively below. The District Court considered the contrary arguments and evidence that the study was implemented in a reasonable fashion,[32] that teaching experience was not a necessary (or necessarily the best) qualification for making the relevant judgments,[33] and that the State adopted cutoff scores lower than those

[30] Ozur Deposition, Ex. D-2 at 18, 55.

[31] US J. S. at 33; NEA J. S. at 29-30.

[32] As part of its refinement of the study design, ETS solicited the views of four independent experts. Each was asked to comment upon the proposed study design, to advance any criticism which he thought might be directed at the study and to make suggestions for improvement. Each of the four experts submitted detailed comments to ETS. Each of the four supported the overall study design. (E. g., *See*, Ex. D-8; Ex. D-5.)

[33] There was evidence in the record that ETS considered and rejected this approach in the study design. For the specific reasoning *see* Manning Deposition, pp. 856-858. ETS was concerned that the perspective of practicing teachers would be too limited to accurately assess the examination. Ex. D-8, at 856-859.

recommended by the study to provide a reasonable margin against judging error.[34] The District Court concluded:

> We find that the results of the validity study are sufficiently trustworthy to sustain defendants' burden under Title VII.

NEA J. S. App. at 38a.

C. *The District Court Correctly Found That Content Validation Satisfied All Applicable Legal Standards.*

The evidence introduced in the District Court established that the NTE accurately and fairly measure knowledge that is necessary to teach effectively. In an effort to circumvent the lower court's amply supported holding, Plaintiffs argue, in essence, that such content validity is not enough, as a matter of law. The United States urges that it is necessary to "validate" a requirement of minimum knowledge "in terms of job performance." (*See*, U. S. J. S. at 31.) Similarly, NEA suggests (in more general terms) that the State was required to but did not show a "sufficient, demonstrable relationship" between the test and the job. (*See*, NEA J. S. at 31.) These contentions are without merit.

Notwithstanding Plaintiffs' assertions to the contrary, the District Court clearly did require the State to demonstrate that the State's use of the NTE had a fair and substantial relationship to the important and job-related objective of hiring and rewarding qualified teachers.[35] After lengthy proceedings, the Court concluded that "there is

[34] Ex. D-28.

[35] The Court specifically noted that this relationship was "substantial," NEA J. S. App. at 25a, and its lengthy review of the evidence concerning the validity study suggests a search for more than a merely "rational" relationship.

ample evidence in the record of the content validity of the NTE." (NEA J. S. App. at 25a.) It is hardly surprising that the Court did not require scientific proof to demonstrate that NTE scores are predictive of overall success in teaching, since there is no available, or generally accepted, definition of what constitutes success as a teacher.[36] The State fully accepts the argument that knowledge is not enough, standing alone, to assure success. On the other hand, such knowledge, as measured by the NTE, is clearly a necessary attribute which the State is entitled to measure and take into account.[37]

It is sufficient, for Title VII purposes, to establish the content validity of an examination. The EEOC Guidelines, found satisfied by the District Court, expressly authorize the use of an employment procedure validated solely on the basis of content validity, where the procedure measures knowledge necessary for the work in question.[38] Furthermore, the Guidelines most recently published by the Department of Justice make clear that content validation is an acceptable approach to the problem of demonstrating that a test has a substantial relationship to employment objectives.[39] In *Washington v. Davis,* 426 U. S. at 247, n. 13, this Court said:

> It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance.

As already noted, there is no serious dispute in this case that knowledge of the material taught in teacher training programs is essential to effective teaching.

[36] The experts for both sides were in general agreement on this point. *See,* for instance, Plaintiffs' expert Dr. Medley, Medley Deposition, Ex. P-112, p. 107.
[37] *See* cases at n. 15, *supra.*
[38] 29 C. F. R. Section 1607.5(a) (1970).
[39] 28 C. F. R. Section 4901.12(c) (1976).

The further objection that it was inappropriate to validate the NTE against the content of teacher training programs[40] was likewise argued and considered below. The District Court observed that the decision to validate against academic training was supported by the testimony of independent testing experts:

> The defendants called as an expert witness Dr. Robert M. Guion, the principal author of **Standards for Educational and Psychological Tests,** published by the American Psychological Association and a nationally recognized authority in the field of testing and measurement who testified in an unqualified fashion that in his expert opinion the ETS study design met all of the requirements of the APA Standards, the Division 14 Principles, and the EEOC Guidelines. Two other experts testified similarly, and ETS sought and obtained favorable opinions on the study design, before its implementation, from another two independent experts.[41]

Ultimately, the job in question is the job of teaching in South Carolina's elementary and secondary schools. However, since South Carolina requires completion of an approved program, a requirement not challenged by Plaintiffs, there is also involved here the "job" of completing that training program. The "essential knowledge" for either of these jobs is knowledge of the subject matter measured by the NTE.

Arguments similar to the ones raised by the Plaintiffs against the NTE study were rejected by this Court in *Washington v. Davis.* Surely, if, as was held there, an employer may use a test that predicts success in training, an employer may use a test that directly measures such success. This would seem to be a "much more sensible con-

[40] US J. S., at 36-37.
[41] NEA J. S. App. at 36-a-37a.

structiton of the job-relatedness requirement" [42] than any theory proposed by the Plaintiffs. Thus, it was entirely appropriate and permissible to validate the NTE with reference to the content of teacher training programs, and the amount of knowledge necessary for minimum competence of a teacher, as was done in this case.

D. *The District Court Correctly Concluded That the State Is Not Required to Rely Solely on Diplomas, Grades, and Experience in Certifying and Setting the Salary Schedule for Teachers.*

Plaintiffs suggest that diplomas and grades provide a better index of minimum competence than results on the NTE. The United States argues that "the best indicator of a prospective teacher's performance in his teacher training program is the prospective teacher's academic record." (U. S. J. S., at 32.) NEA suggests that the State was legally required to alter its system of approving and monitoring programs at state educational institutions. (NEA J. S., at 33.) Plaintiffs' suggestions that the State was required to rely solely on graduation and grades as indices of teacher competence are wholly without merit.

The record below is replete with evidence supporting the State's decision to adopt an objective, merit based process by which to measure candidates' educational accomplishments. First, admission, graduation, and grading practices vary dramatically between differing state institutions.[43] Uncontradicted statistics in the record show that in a random period (1973-75) 204 black graduates of four

[42] 426 U. S. at 251.

[43] For example, an expert witness called by Plaintiffs, Dr. Robert Thorndike, stated that:

> There is abundant evidence that collegiate institutions in the United States vary enormously both in the level of verbal and quantitative ability of the students whom they admit and in the standards of performance that they require in their course work.

Ex. P-110, P-THO-2, at 2.

colleges with minimal admission standards scored on the average less than 900 on the combined examinations, with some schools' graduates averaging closer to 800.[44] In contrast, 85 black students at the University of South Carolina and Winthrop College averaged between 1050 and 1100 on the NTE in recent years.[45] In short, the facts considered below clearly demonstrate that the quality of education, rather than race, accounts for score disparities and that the State had a substantial interest in achieving a statewide, objective measure of competence.

Second, even if standards were uniform throughout all State institutions (as is clearly not the case), grades and graduation, as compared with NTE scores, are based on more subjective and less reliable judgments. Plaintiffs attack the State's validity study on the ground that it involved some subjective determinations concerning the nature of teacher training programs and levels of minimum competence.[46] The fact is obvious that grades and graduation are unsystematic and unvalidated measures of competence, far more susceptible than the NTE to discrimination.[47] The State has never suggested that grades and graduation are irrelevant, but rather that they are not

[44] Ex. D-8, S-MAN-32C, App. A higher score than these averages (920 in the common examination and the Ed. Elem. Sch. TAE, the teaching area in which most applicants in the group of 204 described above were examined), falls in the bottom 3% of applicants nationally (Ex. D-8, S-MAN-9).

[45] Ex. D-8, S-MAN-32C, App. In addition, an ETS study of teacher training programs in the country indicated that schools whose graduates scored 463 or less on the common examinations alone ranked in the bottom 1% of institutions nationally. While this study only covered about half of the teacher training programs in the country, only ten schools fell below 463, indicating that South Carolina colleges form an inordinately large portion of the low-ranking schools. *Prospectus for School and College Officials* (ETS, 1970).

[46] US J. S., at 33-34; NEA J. S., at 29-30.

[47] Dr. Robert Thorndike, comparing the NTE with college grades, stated: "So in this case there *is* a stable score scale to which judgment can be referred. (This is emphatically not true of course grades from college to college, or even from course to course within the same college.)" Ex. P-110, P-THO-2, at 7 (emphasis in original).

sufficiently reliable to provide the only standard for certification.

The NTE also provide a better measure of knowledge for the purposes of the salary formula than any alternative proposed by the Plaintiffs. There is no procedure which can reliably and objectively measure alleged gains in knowledge by experienced teachers other than tests such as the NTE. Subjective evaluations, which may have a place in judging the external aspects of a teacher's classroom performance (such as oral presentation, classroom control, leadership ability, etc.), are an unsatisfactory method of judging a teacher's knowledge of his subject matter and his general knowledge. Subjective evaluations can only be conducted randomly, and a teacher's performance on any given day may be a misleading indicator of his overall level of knowledge.

No alternative to the NTE would provide the uniformity of measurement that is achieved by the statewide administration of an objective, standardized test. Even if knowledge were capable of being measured accurately through subjective evaluations conducted by supervisors, the standards applied by supervisors at the local school district level would vary widely from district to district and would probably result in a general lowering of the knowledge requirement. Districts with less than fully qualified teachers would come to regard (and to pay) those teachers as fully qualified because of the lack of objectively measured qualities. The possible ignorance of some teachers

would be effectively condoned,[48] much to the detriment of the pupils, who would represent yet another generation with inadequate schooling.

In summary, this is not a case in which the State improperly rejected any less biased or more valid alternative procedure for making certification and salary decisions in a manner serving its interest in quality public education. To the contrary, the District Court expressly found, on the basis of substantial evidence, that the subjective and variable information provided by grades, diplomas, and experience did not satisfy the State's legitimate needs. (NEA J. S. App. at 42a.) Further, the District Court's findings that the NTE were fair and accurate measures of job-related knowledge, used without a discriminatory purpose, are amply supported by extensive evidence submitted by the State. Surely the State may lawfully take the best steps available to it in a wholly nondiscriminatory way to determine the qualifications of those charged with educating its school children. Defendants submit that no principle of law requires them to do otherwise.

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[48] In addition, there is no real guarantee that the evaluators themselves would recognize either knowledge or ignorance if they saw it. Dr. William W. Savage, former dean of the USC College of Education, testified:

> I will contend and I have a great deal of support for this, that we have a number of school administrators who, in terms of evaluating whether or not the teacher has any competency at all in the English language, can't evaluate the teachers because they don't know the English language either.

Savage Deposition, Ex. D-9 at 49.

CONCLUSION

For the reasons stated above, these appeals present no important questions of fact or law meriting plenary review by this Court. The judgment below should, therefore, be affirmed without further proceedings.

Respectfully submitted,

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